No. 84-1667

In The

Supreme Court of the United States

October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; et al.,
Petitioners,

v.

MATTHEW N. FRASER, a Minor; et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE FREEDOM TO READ FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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The Freedom To Read Foundation respectfully submits this brief *amicus curiae*. All parties to this cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 36.

INTEREST OF AMICUS

The Freedom To Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and

defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

The Freedom To Read Foundation is deeply committed to fostering education and free expression. The Foundation believes that First Amendment freedoms can be effective only if they are nurtured in our Nation's youth. First Amendment freedoms are most relevant to high school students, the Foundation believes, because "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson* v. *Arkansas*, 393 U.S. 97, 105 (1968). Our public schools are where education in democracy begins. To this end, the Foundation has participated as *amicus curiae* in other cases before this Court where the First Amendment rights of students were at issue, including *Board of Education* v. *Pico*, 457 U.S. 853 (1982).

Pico protected the integrity of the school library. But a library is no more than a collection of books and information built on words. If non-obscene words at a school-sponsored election rally can be suppressed, there is a grave danger that school officials will take this as a license to purge library collections of books containing words deemed "indecent" or "inappropriate," emasculating the library as "a mighty resource in the free marketplace of ideas." *Minarcini* v. *Strongsville City School District*, 541 F.2d 577, 582 (6th Cir. 1976).

SUMMARY OF ARGUMENT

We will not repeat the arguments of the parties. Instead, we write to make two points. First, we will briefly demonstrate why censorship based on notions of "civility" and "decent behavior" has no place in our system of ordered liberty and urge that this Court's decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503

(1969) strikes the proper balance to decide cases like this. Second, we will show that Fraser's use of sexual imagery is no different than speech and literature frequently taught in the classroom.

ARGUMENT

I. THE *TINKER* TEST IS THE PROPER ONE FOR JUDGING FREE SPEECH CLAIMS IN SCHOOLS.

Since *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) there has been no question that the Constitution protects the rights of public school students. Justice Jackson eloquently set forth the reasons for this in *West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624, 637 (1943):

> That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Applying these and other settled First Amendment principles, the Court reaffirmed that students do not leave their First Amendment rights at the schoolhouse door in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

Tinker struck a balance between the First Amendment rights of students and the state's interest in controlling the educational mission of our public schools. The school district there, like Bethel School District here, sought judicial deference to its judgment regarding punishment of student speech. But this Court recognized that such an approach would effectively give school officials "absolute authority over their students" and make it impossible for students to assert their constitutional rights. *Id.* at 511. This Court instead applied a traditional First Amendment test and held that a student's First Amendment rights can only be limited if his speech or conduct "materially disrupts classwork or

involves substantial disorder or invasion of the rights of others." *Id.* at 508.

Tinker is sound constitutional policy because it provides a clear standard to judge student behavior. Under *Tinker* school officials are free of constitutional constraint in dealing with any of the following:

- Conduct that causes physical disturbance or disorder.
- Conduct that materially disrupts classwork, including disrespect to teachers or administrators.
- Conduct that harms other students.

Hence, *Tinker* does not hamper school officials in administering the school effectively.

This case illustrates the appropriateness of the *Tinker* analytical framework. Fraser's speech in no way interfered with Bethel High School's educational mission, and hence should not be abridged.* Fraser's speech caused no physical disturbance or disorder that materially disrupted academics. No classes were cancelled, delayed or disrupted. No student was harmed. The only evidence offered of "disruption"—a few gestures in the audience and a ten-minute discussion in one class (Jt. App. 42-43)—was minor and clearly had no

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* Following is the entire text of Fraser's nominating speech:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be.

substantial effect on classwork. Nor did the speech display disrespect for school authorities that might interfere with school discipline. The speech made no references to school authorities, other than to urge a vote in the student council election for a student who would vigorously assert student interests—hardly an illegitimate message in a student political rally. Under these circumstances, there is no reason why such otherwise constitutionally protected speech should subject Fraser to punishment by the school.

In contrast to *Tinker's* clear rule, Petitioner school district and the United States in this case urge a vacuous standard that provides no basis for principled constitutional adjudication. They would allow the school district to justify its action on the basis of "inculcating proper values" and "standards of decency" in students, and establishing "an atmosphere of civility" in the school. (Pet. Brief at 17-21; Brief of United States at 13-21.)

But any official action can be justified in the name of "proper values," "decency" and "civility." Such words are favorites used by dictators and totalitarian rulers seeking easy justification for unjustifiable acts. No student expression, save perhaps those associated with well-recognized political views, would be safe under such a test.

A standard that allowed such vague justifications of school action could allow a school to become a miniature totalitarian state, beyond judicial review or constitutional restraint. Student speech could be confined only to "expression of those sentiments that are officially approved." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969). School newspapers could be restricted to printing the school administration's viewpoint, and no others. School assemblies could become pep rallies for the official school line, no matter what issue or topic was being addressed. This would not happen in every school, but abandonment of the *Tinker* rule would allow such excesses to go unchecked when they occurred.

Moreover, our Nation's school districts are decentralized, based in local communities and responsive to the needs and desires of those communities. This is a strength, fostering local responsiveness and national diversity. But it also creates dangers to freedoms of those who are part of ethnic, racial, religious or cultural minorities in the school district. Smaller school districts could become dominated by one or another faction, and could seek to make the "proper values" being taught in the schools that of their own dominant group. Minority students who spoke out could find their views suppressed, and in such cases the actions of suppression could be beyond constitutional review if done in the name of "inculcating values" and maintaining an "atmosphere of civility."

Elevating "proper values" and "civility" to the standard for constitutional adjudication may also endanger school libraries, giving school districts the freedom to slant their collections in favor of their version of "proper values" and "civility." Libraries have been the "principal locus" of the freedom of students to inquire and expand their studies and understanding. *Board of Education* v. *Pico*, 457 U.S. 853, 868-69 (1982). But allowing school districts to suppress whatever they consider "indecent," "uncivil," or containing "improper values" could transform libraries instead into the locus of the party line. It is not beyond imagination for a school district to exclude all major literature of certain minority Americans, to the end of promoting the "proper values" of the school board majority. While such action would undoubtedly promote those values, it would also deliver a fatal blow to another, more predominent value—the value of the freedoms of our Bill of Rights, on which our Nation is based.

That school texts and library collections could be censored and sanitized in the name of "civility" and "decency" is not a conjured horrible. Dr. Thomas Bowdler, the Eighteenth Century censor, did just that to some of the greatest texts of the English language, including Shakespeare's works and

Gibbons' *Decline and Fall of the Roman Empire.* Bowdler blue-penciled Shakespeare to suppress every hint of the Bard's creativity with respect to the sexual aspect of human existence. Hansen, "Shakespeare, Sex ... and Dr. Bowdler," *Saturday Review*, April 23, 1955 at p. 7. Such a line-by-line "bowdlerizing" left an antiseptic Shakespeare, less creative and less worth reading. As one contemporary critic of Bowdler noted: "Shakespeare is, of all poets, precisely that one of whom we can least afford to lose one iota ..." *Id.* at p. 8. But allowing speech in schools to be regulated on a vague "decency" and "civility" standard would permit just such misguided and moralistic censorship, which is totally repugnant to our constitutional freedoms.

Finally, one must ask what educational lessons would be taught in a school run by officials who are protected by judicial deference to their own notions of "decency" and "civility." Would students learn the values of democracy, free inquiry and free expression? Or would they learn the cynical lessons of authoritarianism and of orthodoxy imposed from above? This Court has concluded in the past that our schools must not merely educate youth, but must educate them for life in a free, open, and democratic society:

> [T]he First Amendment ... does not tolerate laws that cast a pall of orthodoxy over the classroom. ... The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. *Board of Regents*, 385 U.S. 589, 603 (1967).

This settled principle and the rule of *Tinker* should be reaffirmed, so that the proper balance is maintained between student First Amendment rights and the needs of the educational process. The judgment of both the trial court and the court of appeals should be affirmed.

II. FRASER SHOULD NOT BE PUNISHED FOR A POLITICAL SPEECH THAT USED IMAGERY TAUGHT IN THE CLASSROOM.

Matthew Fraser's nominating speech is protected by the First Amendment. A speech that contains "scurrilous" four-letter words attacking government authority in the most disrespectful terms is protected outside the schoolhouse. *Cohen* v. *California*, 403 U.S. 15, 22 (1971). There is not, nor could there ever be, an argument that Fraser's speech was obscene, libelous, inciteful, or otherwise undeserving of constitutional protection.

Fraser simply used sexual imagery similar to that found in the greatest works of literature, and indeed Bethel High's own student literary magazine. The Court need look no further than the classic works of William Shakespeare to see that Fraser was punished for using sexual imagery and rhetorical devices that are commonly found in great works of literature which are taught in the classroom. Shakespeare used so many sexual images and double meanings that the noted British linguist Eric Partridge devoted an entire book, including a lengthy glossary, to these references. E. Partridge, *Shakespeare's Bawdy* (1948). Partridge found that Shakespeare used 45 different words and phrases to refer to the male sex organ and 68 to refer to the female genitals, as well as more than 350 different words and phrases which refer to sexual intercourse alone. *Id.* at 24-34.

Partridge's treatise recounts scores of sexual metaphors and allusions found in every work of Shakespeare—for example, *The Comedy Of Errors* (*e.g.*, III, ii, 110-136, a description of a woman's body using geographical terms); *Cymbeline* (*e.g.*, II, v, a denunciation of female sexuality); *King Lear* (*e.g.*, IV, vi, 111-134, a series of sexual images and the exhortation "Let copulation thrive!"); *Macbeth* (*e.g.*, II, iii, 27-37, lament on the effect of drink on sexual performance); *Much Ado About Nothing* (*e.g.*, III, iv, 23-74, a dialog on the undesirability of virginity); and *Pericles* (*e.g.*, IV, ii, a brothel scene). It strains credulity that Matthew Fraser could be

punished for his extracurricular nominating speech when such works of great literature are taught as a part of the required curriculum in many of our schools.

Shakespeare is by no means the only revered author to make use of such imagery. Walt Whitman, America's greatest poet and a standard in any American literature course, used such images throughout his poetry. His "A Woman Waits For Me," for example, describes the strength of a man in graphic and famous prose and employs a theme of manliness similar to that of Fraser's nominating speech. W. Whitman, *Leaves Of Grass* 86 (J. Kouwenhoven ed. 1950). *See also Leaves Of Grass, passim* (especially poems "From Pent-Up Aching Rivers," "I Sing The Body Electric," and "Spontaneous Me").

Sexual imagery, moreover, is not confined to great literature; it is employed to convey messages effectively in popular speech and writing. Bethel High School's own student literary magazine employed sexual imagery far more explicit than Fraser's speech. (Jt. App. 13-14.) To then discipline Fraser for his speech without fair warning is unfair and arbitrary censorship.

This is especially true because Fraser's speech was a political speech—speech that is at the core of First Amendment protection. Sexual charges and strong images have been a part of our national political fabric for years—from the slogan "Ma, Ma, Where's my pa? Gone to the White House, Ha! Ha! Ha!" of the 1884 Blaine-Cleveland campaign to the controversy over President Carter's comments about "lust in my heart" in *Playboy*. P. E. Boller, Jr. *Presidential Campaigns* 149 (1984). Indeed, at a prior school election assembly a student had used a "four-letter" word in his speech—again without discipline. (Jt. App. 7, 49.)

Fraser's delivery of his speech at a school election rally does not strip him of these fundamental constitutional protections. To discipline Fraser for his speech violates the First Amendment principles that the state may not discriminate

on the basis of content of non-obscene speech delivered at a public forum, *e.g.*, *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 95-96 (1972); and that the state may not arbitrarily punish speech under the guise of vague standards that do not give fair warning of proscribed conduct. *E.g.*, *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 621 (1976). There was no disruption, let alone a substantial disruption, of the educational process to justify this abridgement of Fraser's free speech rights at a voluntary extracurricular school election rally. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

In sum, against this milieu of sexual references in educational, literary, social and political discourse, a non-obscene speech like Fraser's should not be punished. If "we are not to strangle the free mind at its source" and are to teach our youth that "important principles of our government [are not] mere platitudes," *West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624, 637 (1943), school officials cannot sanitize debate at a high school election to "that which would be suitable for a sandbox." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983).

CONCLUSION

For the foregoing reasons, we join with Respondents and respectfully submit that the decision of the Court of appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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